Supreme Court, U.S.
FILED
JAN 19 1993
OFFICE OF THE CLERK

No. 92-1079

In the Supreme Court of the United States

OCTOBER TERM, 1992

DAVID P. BUCKLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

THEODORE G. HESS
Colonel, USMC

J. CRANDALL FOSTER
Lieutenant, JAGC, USNR
Appellate Government Counsel
Appellate Government Division, NAMARA
Washington, D.C. 20374-1111

QUESTION PRESENTED

Whether the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2, prohibits Congress from authorizing the Judge Advocate General to select commissioned officers in the military to serve as court-martial trial judges.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	2
Conclusion	5

TABLE OF AUTHORITIES

Cases:

Allen v. *United States*, cert. denied, 113 S. Ct. 374 (1992)	2
Bolado v. *United States*, *cert. denied*, 113 S. Ct. 321 (1992)	2
Davis v. United States, 411 U.S. 233 (1973)	4
Freytag v. *Commissioner*, 111 S. Ct. 2631 (1991)	4
Murray v. *Carrier*, 477 U.S. 478 (1986)	4
Solorio v. *United States*, 483 U.S. 435 (1987)	3
Taylor v. *Freeland & Kronz*, 112 S. Ct. 1644 (1992)	3
United States v. *Coffman*, 35 M.J. 591 (N.-M.C.M.R. 1992)	5
United States v. *Prive*, 35 M.J. 569 (C.G.C.M.R. 1992)	4-5
United States v. *Weiss*, No. 67869/MC (C.M.A. Dec. 21, 1992)	4
Wainwright v. *Sykes*, 433 U.S. 72 (1977)	4
Williams v. *United States*, cert. denied, 113 S. Ct. 379 (1992)	2
Youakim v. *United States*, 425 U.S. 231 (1976)	3

Constitution, statutes, and rule:

U.S. Const. Art. II, § 2, Cl. 2 (Appointments Clause)	2
Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.*:	
Art. 67(d), 10 U.S.C. 867(d)	3
Art. 67(h)(1), 10 U.S.C. 897(h)(1)	3
Art. 120, 10 U.S.C. 920	2
Art. 134, 10 U.S.C. 934	2

Statutes and regulations—Continued: Page

28 U.S.C. 1259(3) 3
Courts-Martial R. 905(e) 2, 3, 4

Miscellaneous:

Manual for Courts-Martial, United States—1984 2-3

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1079

DAVID P. BUCKLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Military Appeals, Pet. App. 1a-9a, is reported at 35 M.J. 262. The opinion of the Navy-Marine Corps Court of Military Review, Pet. App. 10a-15a, is unreported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 24, 1992. The petition for a writ of certiorari was filed on December 22, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Following a general court-martial, petitioner was convicted of carnal knowledge, rape, and obstruction of justice, in violation of Articles 120 and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 920 and 934. Petitioner was sentenced to confinement for ten years, forfeitures of $300 pay per month for 120 months, reduction to pay grade E-1, and a dishonorable discharge. On appeal, the Navy-Marine Corps Court of Military Review affirmed the conviction and sentence. The Court of Military Appeals exercised its discretionary jurisdiction to consider one challenge to petitioner's conviction for rape. The court rejected petitioner's challenges to the conviction and affirmed the judgment of the court of military review.

ARGUMENT

Petitioner maintains that the military trial judge was not qualified to hold that position because he was appointed to it by the Judge Advocate General of the Navy in violation of the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2. That claim does not warrant review by this Court, for several reasons.[1]

First, petitioner has not properly preserved his claim for review by this Court. Petitioner did not raise this contention at or before trial and, therefore, has waived his claim under the rules of military procedure. Rule for Courts-Martial 905(e), *Manual for Courts-Martial*,

---

[1] This Court has denied certiorari on that question twice this Term. *Allen* v. *United States*, cert. denied, 113 S. Ct. 324 (1992); *Williams* v. *United States*, cert. denied, 113 S. Ct. 379 (1992); see also *Bolado* v. *United States*, cert. denied, 113 S. Ct. 321 (1992) (applying same principle to the selection of judges on the courts of military review). There is no reason to treat the petition in this case differently.

United States—1984, at II-109.[2] Petitioner also did not raise this claim in the Navy-Marine Corps Court of Military Review or in the Court of Military Appeals, and neither court addressed petitioner's contention. Petitioner, therefore, cannot raise that claim for the first time in this Court. See, *e.g.*, *Taylor* v. *Freeland & Kronz*, 112 S. Ct. 1644, 1649 (1992) ("[O]rdinarily, this Court does not decide questions not raised or resolved in the lower court[s]") (quoting *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976)); *Solorio* v. *United States*, 483 U.S. 435, 451 n.18 (1987).[3]

---

[2] Rule 905(e) provides as follows:

> Failure by a party to raise defenses or objections or to make requests which must be made before pleas are entered under subsection (b) of this rule shall constitute waiver. The military judge for good cause shown may grant relief from the waiver. Other requests, defenses, or objections, except lack of jurisdiction or failure of a charge to allege an offense, must be raised before the court-martial is finally adjourned for that case and, unless otherwise provided in this Manual, failure to do so shall constitute waiver.

[3] The Court of Military Appeals did not grant review on this question. Accordingly, it is not clear that this question is subject to review by certiorari in this Court. The statutes providing for certiorari review of the judgments of the Court of Military Appeals, 28 U.S.C. 1259(3) and 10 U.S.C. 867(h)(1), restrict this Court's certiorari jurisdiction to "[d]ecisions" of the Court of Military Appeals. Article 67(h)(1), UCMJ, 10 U.S.C. 867(h)(1), further provides that this Court may not review by certiorari "any action of the Court of Military Appeals in refusing to grant a petition for review." The Court of Military Appeals has the statutory right to limit its decisions in any case to less than all the issues urged by the accused. See 10 U.S.C. 867(d). Since petitioner did not raise this issue for review by the Court of Military Appeals, there is a question whether that court rendered a "[d]ecision" on the issue that petitioner presents in his petition. For the reasons given in the text, however, it is unnecessary to answer that question in this

Relying on *Freytag* v. *Commissioner*, 111 S. Ct. 2631 (1991), petitioner asks this Court to forgive his waiver. *Freytag* involved an Appointments Clause challenge to the selection of special trial judges by the chief judge of the Tax Court, a challenge that the petitioners had not raised in that court. This Court said that it had the power to excuse the petitioners' waiver, and found *Freytag* to be "one of those rare cases in which we should exercise our discretion to hear petitioners' challenge" despite his failure to assert it in the courts below. 111 S. Ct. at 2639. Petitioner urges the Court to follow the same approach in this case.

Freytag, however, did not involve a rule of procedure, like Rule for Courts-Martial 905(e), requiring a defendant to raise a claim in a timely manner on pain of forfeiture. That difference is material. For the past two decades, this Court has consistently declined to review defendants' claims that have not been properly preserved under the rules of trial and appellate procedure unless the defendant can establish both "cause" and "actual prejudice" for his default. See, *e.g.*, *Davis* v. *United States*, 411 U.S. 233 (1973); *Wainwright* v. *Sykes*, 433 U.S. 72 (1977); *Murray* v. *Carrier*, 477 U.S. 478 (1986). Petitioner has made no effort to satisfy that test. In any event, petitioner has not explained why the question in this case is of such imperative public importance that this Court should deviate from its firmly settled practice of declining to serve as a nisi prius court.

Second, there is no conflict among the circuits on the question presented by the petition. The Court of Military Appeals and two courts of military review have rejected the claim raised by petitioner. *United States* v. *Weiss*, No. 67869/MC (C.M.A. Dec. 21, 1992); *United*

---

case, since the question presented in the certiorari petition does not warrant review by this Court in any event.

States v. *Prive*, 35 M.J. 569 (C.G.C.M.R. 1992); *United States* v. *Coffman*, 35 M.J. 591 (N.-M.C.M.R. 1992). No federal appellate court has ruled to the contrary.

Third, petitioner's claim lacks merit. The question presented in this case is identical to the one presented in *Allen* v. *United States*, cert. denied, 113 S. Ct. 324 (1992) (No. 92-273). We rely upon our brief in opposition in that case.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

THEODORE G. HESS
Colonel, USMC

J. CRANDALL FOSTER
Lieutenant, JAGC, USNR
Appellate Government Counsel
Appellate Government Division,
NAMARA

JANUARY 1993

---

[4] We have supplied petitioner's counsel with a copy of our brief in opposition in *Allen*.